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No. 87-1490

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1988

JOHN E. MALLARD,

*Petitioner,*

—v.—

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

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29 pp

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

PAGE

*Statutes and Rules*





PAGE

*Other Authorities*

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## INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") submits this brief in support of the position of the Respondents.* The Association is a not-for-profit corporation whose nearly 18,000 members consist primarily of members of the bar who practice in the City of New York. The Association's purposes include "cultivating the science of jurisprudence, promoting reforms in the law [and] facilitating and improving the administration of justice." Constitution of the Association, Art. II.

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* Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk in accordance with Rule 36.2 of the Rules of this Court.

This case presents important issues concerning the authority of the federal district courts to appoint counsel for civil litigants who are indigent. While it may be preferable to provide legal services to indigents in worthy cases either through government programs or by the private bar on a voluntary rather than mandatory basis, this case presents the issue of weighing the interests of indigent parties, the federal courts, and the bar when government-sponsored or voluntary *pro bono* representation is not available to those parties.

We submit that there is ample authority, both statutory and judicial, to permit federal district courts to appoint counsel to represent indigent parties in appropriate civil cases. In this case the District Court acted within its authority in appointing Petitioner and did not abuse its discretion in denying his motion to withdraw.

This brief was prepared by the Association's standing committees on Legal Assistance and the Federal Courts, composed of members of the bar interested in and experienced with issues relating to *pro bono* representation and federal court administration.

## STATEMENT

The Association of the Bar of the City of New York adopts the statement of facts as set out in the Respondents' brief.

## SUMMARY OF ARGUMENT

The issue in this case is whether the District Court for the Southern District of Iowa has the authority, either under 28 U.S.C. § 1915(d) or otherwise, constitutionally to require an attorney who is admitted to that court to represent an indigent civil litigant. If the court has such authority and did not abuse it in this case, the Court of Appeals' denial of mandamus should be affirmed. *See Gulfstream Aerospace Corp.* v. *Mayacamus Corp.*, 108 S. Ct. 1133, 1143 (1988); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943).



We submit that the District Court had such authority and that the record reflects no abuse of the court's power in this case. The policy and intent of section 1915, as reflected in its language and legislative history, support the District Court's reasonable interpretation that section 1915(d) permits district courts, when necessary and appropriate, to assign counsel on a mandatory, rather than voluntary, basis.

Moreover, section 1915(d) surely does not preclude a mandatory assignment.* In this case, the District Court exercised its authority under a local practice and procedure for the assignment of counsel in indigent cases. The court's action under the local practice was wholly consistent with both the policy of section 1915 to give indigents their day in court and with the mandate of the Federal Rules of Civil Procedure to assure the just and speedy determination of every action. Fed. R. Civ. P. Rule 1.

Finally, the District Court also had the inherent authority to appoint Petitioner if it believed the assignment of counsel was necessary to effectuate the fair administration of justice. Petitioner, a member of the bar of the court, made no clear showing that his appointment by the court was misguided, abusive, or impinged upon any of his constitutional rights. The District Court properly provided needed representation to the

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• Even though the District Court relied on 28 U.S.C. § 1915(d) for its holding that the court was empowered to appoint attorneys to represent indigent civil litigants, *see Traman* v. *Parkin*, Civ. No. 87-317-B, slip op. at 2 (S.D. Iowa, October 27, 1987) (Appendix to Petition for Writ of Certiorari at 3a), the order of the Court of Appeals may be affirmed on other grounds. The order must be affirmed if the District Court had the power, from whatever source, to appoint Petitioner, even if the lower court relied upon the wrong grounds or gave a wrong reason. *See Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); *see also Roche* v. *Evaporated Milk Ass'n*, 319 U.S. at 32 (mandamus is not appropriate in a situation where "the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of power").

indigents at the cost of imposing some burden and inconvenience on Petitioner. Accordingly, the Court of Appeals was correct in not disturbing the District Court's action.

## ARGUMENT

### I.

### THE DISTRICT COURT IS AUTHORIZED TO APPOINT COUNSEL UNDER 28 U.S.C. § 1915(d)

Section 1915(d) of Title 28 of the United States Code provides that a federal court may "request" an attorney to represent an indigent civil litigant. This law has remained substantially unchanged since Congress established the statutory framework for suits *in forma pauperis* almost a century ago with the passage of the Act of July 20, 1892, 27 Stat. 252 (1892). The District Court, relying on the Eighth Circuit decision in *Peterson* v. *Nadler*, 452 F.2d 754 (8th Cir. 1971), held that section 1915(d) authorized the appointment of Petitioner, against his will, to represent indigent litigants in a civil suit.* Although the wording of section 1915(d) is ambiguous, the legislative history of the 1892 Act suggests that Congress did intend that the federal courts have the power to compel an attorney to represent an indigent client when no attorney volunteers.

When the intent of Congress is clear from the words of a statute, the Court should look no further and the "plain

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* Petitioner is incorrect in his assertion that the Eighth Circuit "stands alone" in holding that section 1915(d) authorizes mandatory appointments. The Courts of Appeals for the Fourth and Fifth Circuits appear to have reached the same conclusion. *See Whisenant* v. *Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984) ("A federal court has discretion to appoint counsel if doing so would advance the proper administration of justice"); *Ulmer* v. *Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) ("cases construe the statute as authorizing a court to 'appoint' counsel").



meaning" of the statutory language controls. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). When the wording of a statute is ambiguous, however, as in section 1915(d), the Court may properly turn to legislative history for expressions of congressional intent. *Id.* at 490. *See also Commissioner of Internal Revenue* v. *Engle*, 464 U.S. 206, 217 (1984); *United States* v. *Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring).

The word "request" in section 1915(d) is not, as Petitioner argues, unambiguously a word that precludes mandatory appointments. To "request" means to "ask." *Webster's Third New International Dictionary* 1929 (1966). While "ask" can mean "seek," in the sense that compliance is purely voluntary, it can also mean "demand." *Id.* at 128. A request is more polite than a demand, but, when made from a position of authority, is not necessarily less compulsory. The essential point is that, since "request" has at least two "ordinary and usual" meanings, *Caminetti*, 242 U.S. at 485, the words of section 1915(d) alone do not reveal the intent of Congress.

Moreover, words in a statute must be considered in light of their contemporary meaning. *Lake County* v. *Rollins*, 130 U.S. 662, 671 (1889). To the drafters of section 1915(d) the words "request" and "assign" were interchangeable. The title of the 1892 Act, for example, used the word "assign" not "request." 27 Stat. 252 (1892) ("An act providing when plaintiff may sue as a poor person and when counsel shall be *assigned* by the court") (emphasis added).* Further, the bill that became section 1915(d) was introduced on the floor of both the Senate and the House of Representatives as a bill

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* The title of section 1915 and the following discussion in this brief answer Petitioner's argument that other statutes providing counsel for poor persons use the word "assign" not "request." *See Brief for the Petitioner* at 18.

empowering courts to "assign" counsel for poor persons. 23 Cong. Rec. 5199, 6264 (1892). Similarly, it appears that contemporary judges uniformly believed that "request" meant "assign," because every decision interpreting section 1915(d) during the first forty years after its enactment used the word "assign" to describe the statute. *See, e.g., Brinkley* v. *Louisville & N.R. Co.*, 95 F. 345, 353 (C.C.W.D. Tenn. 1899) (tracing origin of section 1915(d) to an English statute of Henry VII authorizing judges to "assign" and "appoint" attorneys for poor persons). *See also Boyle* v. *Great Northern Ry. Co.*, 63 F. 539 (C.C.E.D. Wash. 1894) ("assign"); *Whelan* v. *Manhattan Ry. Co.*, 86 F. 219, 220-221 (C.C.S.D.N.Y. 1898) ("assign"); *Phillips* v. *Louisville & N.R. Co.*, 153 F. 795, 797 (C.C.N.D. Ala. 1907), *aff'd*, 164 F. 1022 (5th Cir. 1908) ("assign"); *United States ex rel. Randolph* v. *Ross*, 298 F. 64, 66 (6th Cir. 1924) ("assign"). Even this Court, in a 1948 decision interpreting section 1915(d)'s predecessor, used the word "appoint" instead of "request." *Adkins* v. *E.I. DuPont de Nemours & Co., Inc.*, 335 U.S. 331, 342 (1948).

That the drafters of section 1915(d) and the early cases interpreting the statute used "appoint" and "assign" as synonyms for "request" supports the interpretation that an attorney can be compelled to represent an indigent under section 1915(d). At the least, it shows that the contrary interpretation cannot be found in the words of the statute alone.

The correct interpretation is confirmed by the legislative history of section 1915(d). In a colloquy in the House of Representatives on June 9, 1892, during debate over the bill that became section 1915(d), Representative Culberson explained to Representative Stone that, when an indigent litigant loses his suit and cannot pay court costs, officers of the court will not be paid for their services in the case:

> Rep. STONE: In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?



> Rep. CULBERSON: They do not get any in that event.
>
> Rep. STONE: Then you are simply compelling the officers to do that work for nothing.
>
> Rep. CULBERSON: We are simply in these cases of charity and humanity *compelling* these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.

23 Cong. Rec. 5199 (1892) (emphasis added).

This unambigous expression of congressional intent that federal courts have the power under the statute to compel court officers to work without compensation should guide the Court's interpretation of the word "request". An attorney is also an officer of the court. To require an attorney to represent an indigent is consistent with Congress' express intention in enacting section 1915 that other officers of the court would have the obligation to work for indigents without pay.

## II.

## THE DISTRICT COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. § 2071

The Federal Rules of Civil Procedure are promulgated by this Court under the authority of 28 U.S.C. § 2072.* Rule 83

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* 28 U.S.C. § 2072 (1982) provides in relevant part that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, . . ."

of the Federal Rules of Civil Procedure provides, in relevant part, that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."* Similarly, 28 U.S.C. § 2071 (1982) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Taken together, therefore, Rule 83 and section 2071 establish that a United States District Court, in all cases not provided for by the Federal Rules of Civil Procedure or by its local rules, may regulate the practice to be followed in proceedings properly before it in any manner not inconsistent with the Federal Rules of Civil Procedure or statute. *See, e.g., Franquez* v. *United States,* 604 F.2d 1239, 1244-45 (9th Cir. 1979) (district court did not exceed its jurisdictional authority by granting a jury trial on just compensation issue when federal statute did not provide for same); *Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103, 109 (2d Cir.), *cert. denied,* 385 U.S. 931 (1966) (court may fashion rule concerning service of process outside the Federal Rules if service under Rule 4 was not available); *In re United Corp.,* 283 F.2d 593, 596 (3d Cir. 1960) (approving district court procedure for settling any dispute for allowances of fees and expenses).

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* One of the members of the Advisory Committee on the Federal Rules of Civil Procedure noted that problems left unanswered by the Federal Rules should be disposed of under Rule 83 (the decision-making power) on an ad hoc basis "in accordance with general principles of justice and common sense." *See* A.B.A. Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City 129 (1939) *quoted in* Note, *Rule 83 and The Local Federal Rules,* 67 Colum. L. Rev. 1251, 1253-1255 (1967).



In *Frazier* v. *Heebe,* 107 S. Ct. 2607 (1987), Chief Justice Rehnquist outlined the analysis applied by this Court in determining the validity of a district court's local rule under these standards.* The inquiry is limited to determining:

> [1] whether the rule conflicts with an Act of Congress; [2] whether the rule conflicts with the rules of procedure promulgated by the [Supreme Court]; [3] whether the rule is constitutionally infirm; or [4] whether the subject matter governed by the rule is not within the power of a lower federal court to regulate.

*Id.* at 2616 (the Chief Justice, dissenting) (citing *Colgrove* v. *Battin,* 413 U.S. 149, 159-160 (1973); *Miner* v. *Atlass,* 363 U.S. 641, 651-52 (1960)).**

The local practice at issue in the present case evolved as follows: In *Nelson* v. *Redfield Lithograph Printing,* 728 F.2d 1003 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit, commenting on the reluctance by some judges to request lawyers to appear in *pro bono* cases, directed the chief judge in each district to maintain a sufficient list of attorneys practising in the district in order to supply the court with competent attorneys to serve in *pro bono* cases. *Id.* at 1005. In response to this directive, the judges of the United States District Court for the Southern District of Iowa ordered the clerk of the court to prepare a list of attorneys from which appointments were to be made under 28 U.S.C. § 1915(d).

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* Although the Court of Appeals did not rule on the validity of the local practice in the Southern District of Iowa, such an analysis is essential to the resolution of whether the district court acted within its power when it made the appointment, albeit under Rule 83 as opposed to section 1915(d). *See supra* at 3, n* and cases there cited.

** *Frazier* applies because an established local practice and continued usage will be given the same effect as a written local rule of the court. *See MacNeil* v. *Hearst Corp.,* 160 F. Supp 157, 160 (D. Del. 1958) (citing *Hill* v. *United States,* 298 U.S. 460 (1936)).

*See Coburn* v. *Nix*, Civ. No. 86-716-B, slip op. at 2 (S.D. Iowa, June 16, 1987) (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 2a).

The Southern District of Iowa thus established a local practice that any attorney admitted to practice in the District, who was in good standing and who had appeared as counsel in a non-bankruptcy federal case in the previous five years, was eligible for appointment. The court divided an alphabetized list of these attorneys into three panels and all appointments for a given year were made out of one panel. Attorneys served on a rotating basis within each panel. Therefore, no attorney would be unfairly burdened by frequency of appointment. Morever, under this appointment procedure, account was also taken of those attorneys who (1) had accepted *pro bono* cases in state court within the preceding year; (2) had a busy schedule at the time of the appointment; and (3) had to travel some distance to represent a client. *See Coburn, supra* (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 1a).

That local practice is valid under the *Frazier* standards. First, the local practice does not conflict with an Act of Congress, since, as demonstrated in Point I above, the word "request" in 28 U.S.C. § 1915(d) has at least two meanings, one of which is synonymous with "demand." Second, the local practice does not conflict with the rules of procedure promulgated by this Court, since there is no rule in the Federal Rules of Civil Procedure addressing the power of a court to make such appointments. Third, as discussed in Point IV below, there is no constitutional infirmity in the practice. Finally, as shown in Point III below, the local practice is clearly within the power of the District Court.*

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* In *Frazier*, this Court recognized that a district court has the authority to adopt a local rule or practice "necessary to carry out the conduct of its business," so long as the practice is consistent with "the principles of right and justice." *Frazier*, 107 S. Ct. at 2611 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968)). *See infra* Point III.



## III.

## THE DISTRICT COURT HAS THE INHERENT POWER TO APPOINT COUNSEL

Nothing in 28 U.S.C. § 1915(d) impinges upon a district court's exercise of its inherent powers for the purposes of achieving a just adjudication of a case through the appointment of an attorney to represent a civil litigant unable to employ his own counsel. *See Bowman* v. *White*, 388 F.2d 756, 761 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968) (section 1915(d) "is merely descriptive of the court's inherent power").

This Court has recognized that if certain action is necessary and essential to the proper administration of justice, federal courts have the inherent authority to take the required action. For example, this Court has held that federal courts have an inherent power of contempt. *See Michaelson* v. *United States*, 266 U.S. 42 (1924) (power of contempt is essential to the administration of justice); *Cooke* v. *United States*, 267 U.S. 517, 539 (1925) (the power of contempt is essential in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court); *Levine* v. *United States*, 362 U.S. 610 (1960) (the power to convict for criminal contempt has been deemed an essential and inherent aspect of the existence of the federal courts). The Court has also recognized the power of federal courts to sanction, and to appoint masters and experts as necessary adjuncts to promote the judicial process. *See Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980); *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex parte Peterson*, 253 U.S. 300, 313 (1920).

Most significantly, this Court has often stated that a federal court has the inherent authority to regulate the conduct of its bar, a power which necessarily relies in large measure on the lawyer's position as an officer of the court. *See In re Snyder*, 472 U.S. 634, 643 (1985); *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-379 (1867). In *Theard* v. *United States*, 354 U.S. 278, 281 (1957), this Court adopted the rationale of

Justice Cardozo, while Chief Judge of the New York Court of Appeals, concerning the court's control over an attorney: "Membership in the bar is a privilege burdened with conditions." *Id.* at 281. The Court also stated that an attorney admitted to the court becomes "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *Id.* at 281.

As an officer of the court, a member of the bar enjoys certain powers that others do not possess. For example, admission to the bar creates a license not only to advise and counsel clients, but also to appear in court, try cases, and cause persons to become witnesses in court and for depositions. Such benefits, however, come with corresponding burdens, one of which is that a lawyer, as an officer of the court, is obligated to represent indigents for no compensation upon court order. *See Hurtado* v. *United States,* 410 U.S. 578, 588-589 (1973); *see also United States* v. *Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966) (legal profession has historical obligation to serve indigents without compensation); *Family Div. Trial Lawyers* v. *Moultrie,* 725 F.2d 695, 705 (D.C. Cir. 1984). *Cf. In re Snyder, supra* at 644-645 (license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of the courts in the administration of justice). As the Court of Appeals for the Third Circuit recently stated:

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have by virtue of their license, a monopoly on the provision of such services.

*United States* v. *Accetturo,* 842 F.2d 1408, 1413 (3d Cir. 1988).

Petitioner argues that the issue in the present case is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform



*pro bono* services. *See Brief for the Petitioner* at 26-27. However, attorneys have never had such unfettered freedom. In *Powell* v. *Alabama,* 287 U.S. 45, 72-73 (1932), this Court stated that "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment." *

Finally, the reasoning underlying the Court's recent decision in *Penson* v. *Ohio,* 57 U.S.L.W. 4020 (U.S. 1988), supports the authority of district courts to assign counsel in appropriate cases. The *Penson* opinion reiterates the now well-established principle in the criminal context that lawyers "are necessities, not luxuries." *Id.* at 4022 (quoting *Gideon* v. *Wainwright,* 372 U.S. 335, 344 (1963)). The Court also noted in *Penson* the "paramount importance of vigorous representation," which "follows from the nature of our adversarial system of justice." 57 U.S.L.W. at 4022.

Although the Court has not to date recognized any constitutional right to counsel for indigents in civil cases, those observations are relevant to civil proceedings and especially relevant to this case, where the issue is not the constitutional right of the indigent civil litigant in the abstract but rather the power of the District Court to administer justice fairly in particular cases where the court deems the appointment of counsel necessary. Certainly, the significance of forceful and careful advocacy in achieving truth and fairness in court proceedings warrants and legitimizes the District Court's appointment of counsel for indigents to achieve those goals.

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* Thus, there is no support for the observation made by Amici California Attorneys for Criminal Justice that federal courts lack the power to compel an attorney to represent even criminal defendants. *See also United States* v. *Bowe,* 698 F.2d 560, 566 (2d Cir. 1983); *Bristol* v. *United States,* 129 F. 87, 88 (7th Cir. 1904). *Ferri* v. *Ackerman,* 444 U.S. 193 (1979), which held that appointed attorneys are not entitled to absolute immunity from malpractice suits, and is cited by Amici, never addressed this issue.

## IV.

## THE APPOINTMENT OF COUNSEL DOES NOT VIOLATE THE CONSTITUTION

### A. The Fifth Amendment Does Not Require that Counsel Be Compensated

Petitioner argues that compulsory representation of indigent civil litigants without compensation violates the Fifth Amendment by taking an attorney's property for public use without just compensation. Petitioner's appointment, however, does not contravene the Fifth Amendment.* While it is conceivable that compelled representation without compensation might under some circumstances become so burdensome as to constitute an unconstitutional taking of property, there was no taking here — both because the District Court followed a procedure for insuring that Petitioner's appointment was not overly burdensome, and because Petitioner neither claimed nor made any showing of undue burden.

The District Court would have violated the Fifth Amendment by appointing Petitioner to represent the indigent clients in this case only if (1) Petitioner's legal services are "property" within the meaning of the Fifth Amendment, and (2) the appointment was a "taking" requiring compensation. *See Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124-25 (1978).

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* Petitioner also argues that his appointment violates the First Amendment because he feels incompetent and dislikes confrontation. *See Brief for the Petitioner* at 40. This argument is entirely unsupported in the record, and is undercut by his concession that federal courts can legally compel unwilling attorneys to represent indigent civil litigants under 42 U.S.C. § 2000e-5(f)(1), *see Brief for the Petitioner* at 20-21, and indigent criminal defendants under 18 U.S.C. § 3006A(b), *see Brief for the Petitioner* at 22-23 n. 1.



An attorney's legal services are "property" if the attorney has a "reasonable expectation" that his services are for his private use only. *Penn Central*, 438 U.S. at 125. Although professional services may under some circumstances constitute "property,"* holdings of this Court make clear that an attorney has no reasonable expectation that he will never be called upon to represent an indigent civil litigant without compensation. *See, e.g., Hurtado* v. *United States*, 410 U.S. 578, 588-89 (1973) ("the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed," for example, "representation of indigents by court-appointed attorney"); *cf. Moultrie*, 725 F.2d at 705 (because attorneys were repeatedly informed of possibility of assignment of cases for no pay, they had no "expectation rising to the level of a property right that they would be compensated"). To the extent that an attorney should reasonably expect that he can be required by public authority to represent an indigent client without pay, the attorney has no protected property interest in such representation.

Moreover, the compulsory representation involved in this case is not a "taking" for purposes of the Fifth Amendment. First, there can be a taking only if the governmental interference harms the individual's "reasonable investment-backed expectations." *United States* v. *Locke*, 471 U.S. 84, 107 (1985). *See Hodel* v. *Irving*, 107 S. Ct. 2076, 2083 (1987); *Keystone Bituminous Coal Ass'n* v. *DeBenedictus*, 480 U.S. 470, 497 (1987). Under the ethical rules of the profession, an attorney should anticipate that a portion of his practice will be devoted to *pro bono* representation, and he has an ethical

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* *See Butler* v. *Perry*, 240 U.S. 328, 333 (1916) ("for some purposes labor must be considered as property"). *Cf. Dillon*, 346 F.2d at 636 (unnecessary to decide if attorney's services are property); *Tyler* v. *Lark*, 472 F.2d 1077, 1079 n.3 (8th Cir. 1977) (same); Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 Colum. L. Rev. 366, 385-86 (1981) (arguing that attorneys' services are property).

obligation to accept *pro bono* appointments absent "compelling reasons," Model Code of Professional Responsibility EC 2-29 (1980), or "good cause," Model Rules of Professional Conduct Rule 6.2 (1984).* Thus, only an extraordinarily burdensome court appointment would frustrate an attorney's reasonable economic expectations.

Secondly, no taking occurs where, in the words of Justice Holmes, there is an "average reciprocity of advantage" between the injury caused by the specific government action and the benefit to the individual from the overall regulatory scheme. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922). *See also Penn Central,* 438 US. at 147 (Rehnquist, J., dissenting) (explaining that zoning is not a taking because "on the whole an individual who is harmed by one aspect of zoning will be benefited by another"); *Hodel,* 107 S. Ct. at 2083; *Keystone,* 480 U.S. at 491.

Just as Petitioner is called upon periodically to provide uncompensated legal services to indigents, he gains advantages from public authority through his license to practice law. The government grants attorneys a monopoly to practice law that is of substantial economic benefit, and in a sense even creates the demand for an attorney's services. *See* Green, *supra,* at 389-90. Under these circumstances,

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• *See also Dillon,* 346 F.2d at 635 (no taking because an "applicant for admission to practice law may justly be deemed to be aware . . . that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order"). *Accord Williamson* v. *Vardeman,* 674 F.2d 1211, 1215 (8th Cir. 1982) (citing ten additional cases holding that requiring counsel to serve without compensation is not a taking); *Tyler* v. *Lark,* 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied sub nom. Beilenson* v. *Treasurer of United States,* 414 U.S. 864 (1973); *Dolan* v. *United States,* 351 F.2d 671, 672 (5th Cir. 1965).



Petitioner enjoys a "reciprocity of advantage," and there is no taking of his services.*

### B. Counsel Is Not Required to Pay the Expenses of a Section 1915(d) Appointment

Petitioner suggests that it is a violation of the Constitution for a court to compel an attorney to pay the expenses that arise from representation of an indigent. *See Brief for the Petitioner* at 51. Along the same line, Amici California Attorneys for Criminal Justice make much ado about what they view as the conflict between a lawyer's natural desire to spend as little of his own money as possible and his duty of reasonable thoroughness and preparation. *See Brief for California Attorneys for Criminal Justice* at 26-38. Amici go so far as to inform the Court that because of this conflict, appointed lawyers should be held to a lower standard of care than those who have paying clients, and ask the Court to

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• Again, we recognize that if the burden of the appointment creates a substantial hardship, far outweighing the benefit conferred by the state through the license to practice law, then the Fifth Amendment might require compensation. Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 Harv. L. Rev. 735, 775 (1980). *See Moultrie,* 725 F.2d at 705-707 (taking if appointment "effectively denies [attorney] the opportunity to maintain a remunerative practice"); *State ex rel. Partain* v. *Oakley,* 227 S.E.2d 314, 319 (W. Va. 1976) (same); *Bias* v. *State of Oklahoma,* 568 P.2d 1269, 1271-73 (Okla. 1977). *See also People ex rel. Conn* v. *Randolph,* 219 N.E.2d 337, 341 (Ill. 1966) (appointment unconstitutional because counsel suffered "extreme, if not ruinous, loss of practice and income"); *State of Missouri* v. *Green,* 470 S.W.2d 571, 573 (Mo. 1971) ("the burden is more than the profession also should shoulder"); *Honore* v. *Washington State Board of Prison Terms and Paroles,* 466 P.2d 485, 496 (Wash. 1970) (counsel appointed to represent habeas corpus petitioners must be compensated because of "extremely heavy and time consuming burden"). The District Court, however, followed a procedure here that was designed to insure, and on the record did insure, that Petitioner was not overly burdened by the appointment. *See Coburn, supra* (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 2a).

reconsider its ruling in *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), that appointed lawyers have no immunity from malpractice suits.

The Court, however, need not consider whether requiring an attorney to pay the expenses of representing an indigent client might, in some general sense, create an intolerable conflict of interest, or might violate the Constitution, because there is no showing here that Petitioner would have been responsible for his out-of-pocket expenses. Rather, the procedure established by the Court of Appeals for the Eighth Circuit in *Nelson* v. *Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984), is for the district courts to reimburse appointed counsel for all expenses made in good faith. *Id.* at 1005. *Cf. Williamson* v. *Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir. 1982) ("lawyers have no duty to pay expenses"). The payment of expenses is thus — in this case, at least — an issue that this Court need not address.*

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* Regardless of whether an attorney can constitutionally be compelled to spend his own money preparing and presenting a case for trial, we note that the Model Rules of Professional Conduct state that "a lawyer representing an indigent client *may* pay court costs and expenses of litigation on behalf of the client." Rule 1.8(e)(2) (1984) (emphasis added). We believe that if an appointment of counsel were to reach this kind of alleged unconstitutional imposition on counsel, *a fortiori* grounds would have been established for counsel to seek relief from his appointment for cause. *See* Model Rules of Professional Conduct Rules 1.16(b)(5), 6.2(b) (1984).



## V.

## COUNSEL IS ETHICALLY OBLIGATED TO ACCEPT THE APPOINTMENT

Finally, contrary to Petitioner's contentions,* his appointment is entirely consistent with the ethical standards of the legal profession. Even without a court appointment, attorneys are ethically obligated to provide uncompensated public interest legal service. *See* Model Code of Professional Responsibility EC 2-25 (1980) (the rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, and every attorney should support all proper efforts to meet this need for legal services); Model Rules of Professional Conduct Rule 6.1, Comment (1984) ("The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . .").

Attorneys have an ethical duty to accept proper court appointments to represent indigent litigants. The Model Code of Professional Responsibility states that when an attorney is "appointed by a court . . . to undertake representation of a person unable to obtain counsel, he should not seek to be excused from undertaking the representation except for compelling reasons." Model Code of Professional Responsibility EC 2-29 (1980). The Model Rules of Professional Conduct similarly subject an attorney to discipline if he seeks to avoid

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* Petitioner argues that the appointment process is inconsistent with Disciplinary Rule 6-101(A)(1) of the Iowa Code of Professional Responsibility for Lawyers, which states that "[a] lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." *See Brief for the Petitioner* at 30. In the present case, the District Court held, however, that Petitioner was competent to represent plaintiffs in the underlying action.

a court appointment without "good cause." Model Rules of Professional Conduct Rule 6.2 (1984).

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: New York, New York
December 30, 1988

Respectfully submitted,

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